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Reply to
Nashville Office

January 10, 2005

Chairman Pat Miller
Attn: Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

RE: Petition of King's Chapel Capacity, LLC for Certificate of Convenience and Necessity to Serve an Area in Williamson County, Tennessee Known as Ashby Community Docket No. 04-00335

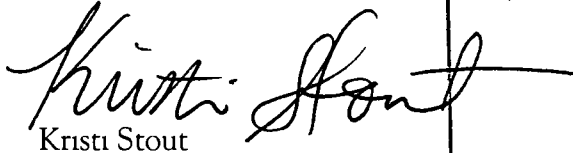
Dear Chairman Miller.

Please find enclosed for filing, an original and 14 copies of Petition for Appeal of the Order of Abeyance of the Hearing Officer of King's Chapel Capacity, LLC. Please date stamp one copy for my records.

Thank you for your assistance regarding this matter. If you have any questions, or if I may be of further assistance, please do not hesitate to contact me.

Very truly yours,

FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP, PLC


Kristi Stout

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:

**PETITION OF KING'S CHAPEL)
CAPACITY, LLC FOR CERTIFICATE OF)
CONVENIENCE AND NECESSITY TO)
SERVE AN AREA IN WILLIAMSON)
COUNTY, TENNESSEE KNOWN AS)
ASHBY COMMUNITY)**

DOCKET NO. 04-00335

**PETITION OF APPEAL FROM ORDER OF
ABEYANCE OF THE HEARING OFFICER**

King's Chapel Capacity, LLC ("KCC") respectfully submits its Petition for Appeal of the Order of Abeyance of the Hearing Officer.

I. Standard of Review

Even after the Authority appoints an employee as hearing officer pursuant to T.C.A. § 65-2-111, the Directors still retain final decision-making authority. Tenn. Code Ann. § 65-2-111 authorizes a hearing officer to "make a proposal for decision in writing" to the Authority but it also requires the directors to "personally consider the entire record, or such portion thereof as may be cited by the parties, and shall make its decision..." Id. Further, in Jackson Mobilphone Co. v. Public Service Commission, 876 S.W. 2d 106, 111 (Tenn. Ct App. 1994), the Court of Appeals interpreted T.C.A. § 65-2-111 and the corresponding provisions of the Uniform Administrative Procedure Act as follows:

The [Authority] is not simply acting as an error-correcting body when it reviews a proposed or initial order. It must personally review the relevant portions of the administrative record, and then it must reach its own decision.

See Consumer Advocate Division v. Tennessee Regulatory Authority, No. 01A01-9708-BC-00391, 1998 WL 684536, *1, (Tenn. Ct. App. Jul 01, 1998). King's Chapel respectfully requests that the Directors give this Petition a *de novo* review.

II. Background

King's Chapel Capacity, LLC is owned by Charles Pinson, John Powell, and Elaine Powell. These individuals also were the developers of a subdivision referred to interchangeably throughout this docket as Ashby Communities and/or King's Chapel subdivision (hereinafter referred to generally as "Subdivision") in Williamson County. On October 5, 2004, King's Chapel Capacity, LLC ("KCC") filed a Petition for a Certificate of Public Convenience and Necessity ("CCN") to provide wastewater services to the Subdivision. Although this area is within the blanket service area of a CCN granted to Tennessee Wastewater Systems, Inc. (f/k/a On-Site Systems, Inc. and hereinafter referred to as "TWS") to serve a portion of Williamson County, TWS neither owns nor operates any facility capable of serving the Subdivision.

Before filing a Petition for a CCN, the developers began negotiating a contract with TWS through its Vice-President Robert Pickney to construct a sewer facility in the Subdivision. During this time, the developers paid in excess of \$250,000 to TWS for construction of the facility. However, the parties did not reach final agreement and no contract was ever executed.

In spite of this, TWS filed a Petition to Intervene claiming that KCC could not receive a CCN to serve the Subdivision because TWS already had a CCN to serve the same area and that TWS was under contract with KCC to provide wastewater services to the Subdivision. Concurrently, TWS filed breach of contract and civil conspiracy claims against the principals of KCC in the Williamson County Chancery Court requesting injunctive relief, declaratory relief,

and monetary damages. These claims were asserted with facts and circumstances that allegedly occurred during construction of the King's Chapel wastewater treatment system.

After filing this Complaint, TWS filed a motion with the TRA requesting that these proceedings be held in abeyance until the conclusion of the Williamson County Chancery Court suit and ongoing proceedings at TDEC. KCC responded by arguing that no contract exists and that it is the sole owner of the property on which TWS initially began construction of the wastewater facility. Further, KCC has argued through sworn affidavits that the contract presented by TWS is a forgery to which TWS has entered no contradicting evidence in response. TWS has presented no conveyances, deeds, or any other instruments, other than the forged documents at issue in the Williamson County Chancery Court, which give TWS any interest whatsoever in the property at issue in this matter. However, the Hearing Officer entered an Order Granting Motion to Hold Proceedings in Abeyance on December 17, 2004, holding that until the Williamson County Chancery Court determines who owns the sewer system and TDEC determines who will possess a state operating permit, "Authority cannot move forward with proceedings to approve or deny King's Chapel's Petition." Without this information there is no way to determine who is the incumbent and who is the competitor to determine the applicability of T.C.A. § 65-4-203(a)¹ *December 17, 2004 Order*, p. 6.

KCC filed a Motion to Reconsider or In The Alternative Motion For Intermediate Relief on December 20, 2004 and a hearing was held on December 28, 2004 on the Motion. The

¹ T.C.A. § 65-4-203(a) (2004) reads:

The authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, *which will be in competition with any other route, plant, line, or system*, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provisions of this part. (Emphasis added)

Hearing Officer denied the Motion to Reconsider and the Motion for Intermediate Relief. This appeal is in response to the Hearing Officer's decision in that proceeding.

III. Argument

In examining KCC's CCN Petition pursuant to T.C.A. § 65-4-203(a), the Hearing Officer held that ownership of the facility must be determined to proceed. However, the Hearing Officer has failed throughout these proceedings to address the arguments made by KCC that no contract exists and that it is the sole owner of the property on which TWS initially began construction of the wastewater facility. Most importantly, KCC has argued through sworn affidavits that the contract presented by TWS is a forgery. During the hearing held on December 28, 2004, TWS presented no evidence contradicting this assertion nor has it ever presented any instruments of conveyance, deed, or any other documents to show that it has any current interest in the property. None of the orders by the Hearing Officer address this issue making it appear that anyone can submit a document that might show an ownership interest and delay CCN applications indefinitely

Further T.C.A. § 65-4-203(a) cannot apply to the facts in this case. As argued in the Response of King's Chapel Capacity, LLC To Motion to Hold Proceedings in Abeyance ("Response"), this statute does not operate to prohibit competition between existing public utilities generally, but is specific to competition between any existing routes, plants, lines or systems *Response*, p. 5. TWS owns no route, plant, line, or system capable of serving the Subdivision. The types of wastewater treatment facilities such as the one partially constructed at the Subdivision are site specific and only capable of serving smaller, particularly defined areas such as subdivisions containing less than two hundred fifty (250) residential lots. TWS has offered no proof that it owns any route, plant, line, or system in competition with the facility at

the Subdivision. Accordingly, the statute does not apply to this case, and therefore, it is unnecessary to move to the second prong of the statute to show TWS's refusal or neglect to offer adequate service.

Holding this case in abeyance is not in the interest of the public, especially those forty-eight (48) lot owners prevented from building homes pending a resolution of this proceeding. This entire subdivision cannot be served with sewer services until a CCN is granted. Because no conveyances of any property in the Subdivision may be transferred to any other individual without there first being sewer service available to the subdivision, this abeyance will result in unreasonable costs to KCC (approximately \$25,000 per month) which will, in turn, be passed on to the consumer. KCC maintains that TWS is merely attempting to prohibit the growth of competition among a limited number of privately owned public utilities throughout the state. Allowing this proceeding to move forward is consistent with the mission statement of the Authority and should not be unreasonably delayed by an anticipated order of the Chancery Court in a lawsuit between the same parties based upon related, but not dependent issues.

IV. Conclusion

The mission of the Tennessee Regulatory Authority is "to promote the public interest by balancing the interests of utility consumers and providers while facilitating the transition to a more competitive environment." KCC maintains that entire proceeding is an attempt by TWS to protect its service area in Williamson County. Holding this case in further abeyance on the basis of a forged contract is not in the best interest of the public and will only increase costs to the developers and ultimately to consumers. KCC respectfully requests that the Directors give this Petition a *de novo* review and that it be allowed to present oral argument in support of its appeal.

Respectfully submitted,

FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP, PLC

Charles B. Welch, Jr. (with permission)
Kirsti Stout

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(615) 726-1200

CERTIFICATE OF SERVICE

The undersigned hereby certified that the foregoing document has been served upon the following person/s by hand delivery or by United States Mail, with proper postage prepaid thereon:

Henry Walker, Esquire
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P.O. Box Nashville, Tennessee 37219

Richard Militana
Militana & Militana
5845 Old Highway 96
Franklin, Tennessee 37064

This ____ day of January 2005.

Charles B. Welch, Jr. (with permission)
Kirsti Stout
Charles B. Welch, Jr.